IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2003 Session

QUEEN'S TREE SURGERY, INC., Plaintiff/Appellee, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant/Appellant, PIEDMONT NATURAL GAS COMPANY, INC., d/b/a NASHVILLE GAS COMPANY, Defendant/Cross-Defendant, and CHARTER TRANSPORT CORPORATION, Defendant/Cross-Plaintiff

Direct Appeal from the Circuit Court for Davidson County
No. 02C-1692 Hon. Walter Kurtz, Circuit Judge

No. M2003-00228-COA-R3-CV - Filed November 24, 2003

Appellant defendant in this action for damages was non-suited and then added as defendant pursuant to TCA § 20-1-119. This defendant appealed from adverse judgment. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR. J., joined.

Ann O'Connell, Margaret Darby, and John L. Kennedy, Nashville, Tennessee, for Defendant/Appellant.

Queen's Tree Surgery, Inc., Nashville, Tennessee, Pro Se Plaintiff/Appellee.

OPINION

In this action for property damages, an agreed Judgment was entered allocating damages, and the Metropolitan Government of Nashville and Davidson County ("Metro") has appealed.

The issues raised on appeal are:

1. Whether the Plaintiff's claim is barred by its voluntary non-suit?

2. Whether the trial court erred by allowing Plaintiff to non-suit the Metropolitan Government in order to refile suit against the Metropolitan Government pursuant to Tenn. Code Ann. § 20-1-119?

Plaintiff's vehicle was involved in an automobile accident on June 27, 2000. All defendants agree that plaintiff was not at fault for the accident. Plaintiff filed suit against all defendants on June 13, 2002. In the course of litigation, the plaintiff argued the discovery rule tolled the time to file against Metro, stating it did not learn of Metropolitan's possible involvement until July 26, 2001. (This issue was not directly raised on appeal.) On June 24, 2002, Metro filed a Rule 12.06 Motion to Dismiss on the grounds that the statute of limitations expired pursuant to Tenn. Code Ann. § 29-20-305(b), and that as a governmental entity, it was not subject to common law liability as alleged by the complaint.

On June 27, 2002, defendant Piedmont answered and alleged that Metro was guilty of negligence which caused or contributed to cause plaintiff's damages. Plaintiff filed an Amended Complaint on July 22, 2002, adding allegations against Metro under the Governmental Tort Liability Act. On August 19, 2002 plaintiff filed a Notice of Non-suit as to Metro. On August 19, 2002, plaintiff moved to be permitted to file a "Second Amended Complaint". On August 22, 2002, the Court entered an Order dismissing Metro without prejudice, and on the same date, the Court entered an Order granting plaintiff's Motion to permit it to file an amended complaint. On September 5, 2002, plaintiff filed an "Amended Complaint", renaming Metro as a party defendant pursuant to Tenn. Code Ann. § 20-1-119.

Metro essentially argues that Tenn. Code Ann. § 20-1-119 was not available to plaintiff under these circumstances, because the plaintiff knew of Metro's alleged negligence and named Metro as a defendant, and as a condition to invoke the statute, only applies to "a person not a party to the suit".

Tenn. Code Ann. § 20-1-119 states in pertinent part:

(a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against such person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging such person's fault, either:
(1) Amend the complaint to add such person as a defendant pursuant to Rule

> 15 of the Tennessee Rules of Civil Procedure and cause process to be issued for that person; or
>
> (2) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an "original complaint initiating the suit" or "an amended complaint" for purposes of this subsection.
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> . . .
>
> (g) Notwithstanding any provision of law to the contrary, this section applies to suits involving governmental entities.

Townes v. Sunbeam Oster Co., Inc., et al., 50 S.W.3d 446 (Tenn. Ct. App. 2001), instructs on these issues. The Court said, and we agree, that the statute is not ambiguous. It said:

> *Tenn. Code Ann. § 20-1-119* makes no reference to a plaintiff's diligence in discovering the identity of potentially liable parties. The statute provides a plaintiff with a ninety-day window within which to assert a claim against a comparative tort-feasor as long as two conditions are met. The first condition is that one of the defendants must name the comparative tort-feasor as one who "caused or contributed to the injury or damage for which the plaintiff seeks recovery." The second condition is that the named comparative tort-feasor is "not a party to the suit."

The *Townes* Court also answers the question as to when the status of a party is determined. The Court said:

> We have already concluded that *Tenn. Code Ann. § 20-1-119,* should be construed liberally to enable plaintiffs to have their claims adjudicated on the merits. Consistent with this construction, we have concluded that an added defendant's status as a party should be determined, not when the original defendant names the added defendant as an additional comparative tort-feasor in its answer or amended answer, but rather when the plaintiff either seeks to amend its complaint to name the additional comparative tort-feasor as an additional defendant or to file a separate complaint against the additional comparative tort-feasor.

In this case, the non-suit of the party was effective upon filing of the written notice of non-suit. *Snell v. Leffew,* 558 S.W.2d 849 (Tenn. Ct. App. 1977). While the Motion to file an Amended Complaint was filed on the same date as the Notice of Non-Suit, it was filed subsequent in time to the filing of the Notice of Non-Suit, and Metro was not a party to the action at the time the Motion to Amend was filed. Metro argues that it is a perversion of the statute to permit a plaintiff to non-suit a defendant for the singular purpose of refiling under the statute. However, we conclude that plaintiff merely availed itself of all possible remedies available within the law through skillful and diligent

representation. Appellee points out that had Metro not been named in the original suit, it would be indisputable that it could invoke 20-1-119 after the defendant alleged comparative fault against Metro. In our view this is a matter of "insur[ing] that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties". *Doyle v. Frost*, 49 S.W.3d 853, 855 (Tenn. 2001).

Finally, Metro argues that since any suit brought under the GTLA must be brought within twelve months after the cause of action arises, an interpretation of Tenn. Code Ann. § 20-1-119, which will allow suit to be brought after the twelve months had run, would frustrate the purposes of the GTLA. We cannot agree. Tenn. Code Ann. § 20-1-119 clearly allows the party to be added within ninety days from the filing of the answer alleging such person's fault. Section (g) explains that the statute "applies to suits involving governmental entities". *See Townes; Conley v. State,* 2003 WL 21226810 (Tenn. Ct. App., May 27, 2003) and *Humphrey v. State,* 2003 WL 22046152 (Tenn. Ct. App., Aug. 28, 2003).

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to the Metropolitan Government of Nashville and Davidson County, Tennessee.

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HERSCHEL PICKENS FRANKS, J.